St. John's Law Review

Volume 70, Fall 1996, Number 4 Article 9

New York State Supreme Court, Appellate Division, Grants Yellowstone Injunction After Requisite Time Period Expires

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New York case law provides that a landlord may promulgate new rules and regulations for his or her building if the rules and regulations are uniformly applied to all tenants and are inherently "reasonable."[1] A new rule or regulation may not, however, unilaterally modify the terms of a tenant's current lease in the absence of consideration unless such change is "in writing and signed by the party against whom it is sought to [be] enforce[d] ...."[2] If a landlord unilaterally modifies a lease and a commercial

[1] *See* Thousand Island Park Ass'n v. Tucker, 173 N.Y. 203, 212-13, 65 N.E. 975, 977-78 (1903) (stating new regulations may be validly established if they are reasonable and consistent with those at time leases were made); Opoliner v. Joint Queensview Hous. Enter., Inc., 11 A.D.2d 1076, 1076, 206 N.Y.S.2d 681, 682 (2d Dep't 1960) (suggesting that reasonableness is required for establishing new rules); 1 JOSEPH RASCH, NEW YORK LANDLORD AND TENANT INCLUDING SUMMARY PROCEEDINGS § 15:46, at 713 (3d ed. 1988) (stating well settled principle that "rules and regulations, imposed during the [lease] term pursuant to the reserved right so to do, to be valid and enforceable must be reasonable"); *see also* John A. Humbach, *Landlord Control of Tenant Behavior: An Instance of Private Environmental Legislation*, 45 FORDHAM L. REV. 223, 309 (1976) (discussing reasonableness as interpreted by courts).

[2] N.Y. GEN. OBLIG. LAW § 5-1103 (McKinney 1989). Disguising a unilateral lease modification as a "new building rule" also has been held unenforceable. *See* La Coquille of Westhampton Beach, Inc. v. Robinson, 48 A.D.2d 633, 634, 368 N.Y.S.2d 195, 197 (1st Dep't 1975) (holding unwritten building rule which prohibited overnight guests without presence of tenant unreasonably restricted use and occupancy of apartment for dwelling purposes); *see also* North Broadway Estates, Ltd. v. Schmoldt, 147 Misc. 2d 1098, 1101, 559 N.Y.S.2d 457, 459 (Yonkers City Ct. 1990) (holding building rule unenforceable because it unilaterally modified an express provision in lease without obtaining compliance with amended provisions).

tenant is served with a Notice of Default based on the modification, the tenant may apply for *Yellowstone* injunctive relief.[3] A

[3] The purpose of a *Yellowstone* injunction is to allow commercial tenants, in danger of lease termination, to toll the cure period pending a determination on the merits. *See* 2 RASCH, *supra* note 1, § 23:53, at 218. A *Yellowstone* injunction preserves the status quo until such determination on the merits by prohibiting a landlord from exercising his right to terminate the lease due to the default during the pendancy of the action. *See, e.g.*, First Nat'l. Stores, Inc. v. Yellowstone Shopping Ctr., Inc., 21 N.Y.2d 630, 637, 237 N.E.2d 868, 870-71, 290 N.Y.S.2d 721, 724-25 (1968); *see also* Sportsplex of Middletown, Inc., v. Catskill Reg'l Off-Track Betting Corp., 633 N.Y.S.2d 588, 588 (2d Dep't 1995) (discussing purpose and effect of *Yellowstone* injunctions); Titleserv, Inc., v. Zenobio, 210 A.D.2d 311, 313-14, 619 N.Y.S.2d 765, 767 (2d Dep't 1994) (discussing purpose and necessity of *Yellowstone* injunctions); Heavy Cream, Inc. v. Kurtz, 146 A.D.2d 672, 673, 537 N.Y.S.2d 183, 184-85 (2d Dep't 1989) (recognizing need to preserve rights of lessees to cure in order to prevent forfeiture of substantial property interests in lease).

Requests for *Yellowstone* injunctive relief must be made in the supreme court because the civil court does not have jurisdiction to grant injunctive relief. *See* 2 RASCH, *supra* note 1 § 23:53, at 218-19. Once the Supreme Court makes a judgment on the merits, the injunctive stay terminates. If the tenant loses, he or she must either cure the default within the remaining cure period or the lease will terminate and the tenant can legally be evicted. *Id.* at 219.

A tenant seeking a *Yellowstone* injunction must establish that: 1) it holds a commercial lease, 2) it has received from the landlord a notice of default, a notice to cure, or a threat of termination of the lease, 3) the application for a temporary restraining order was made prior to the termination of the lease, and 4) it has the desire and ability to cure the alleged default by any means short of vacating the premises. *In Re* Langfur, 198 A.D.2d 355, 356, 603 N.Y.S.2d 576, 577 (2d Dep't 1993).

In *Long Island Gynecological Services* [hereinafter LIGS], the landlord's main contention was that the tenant's application for a *Yellowstone* injunction was untimely because it was filed after the landlord served the Notice of Termination thereby divesting the court of its power to grant a *Yellowstone* injunction. Long Island Gynecological Servs., P.C. v. 1103 Stewart Ave. Assoc. Ltd. Partnership, 638 N.Y.S.2d 959, 961-62 (2d Dep't 1996); *see also* Rappa v. Palmieri, 203 A.D.2d 270, 270, 610 N.Y.S.2d 286, 286 (2d Dep't 1994) (holding motion for *Yellowstone* relief untimely because tenant did not move for said relief until after termination notice was served); S.E. Nichols, Inc. v. American Shopping Ctrs., Inc., 115 A.D.2d 856, 858, 495 N.Y.S.2d 810, 812 (3d Dep't 1985) (stating there is no basis for preliminary injunctions sought after termination notice is served); Health 'N Sports, Inc. v. Providence Capitol Realty Group, Inc., 75 A.D.2d 884, 885, 428 N.Y.S.2d 288, 289 (2d Dep't 1980) (holding failure of tenants to obtain a stay of curative period divested court of its power to grant *Yellowstone* injunction).

The tenant argued that paragraph 13 of the lease specifically allowed the tenant more than 30 days to cure if a default could not be cured within 30 days and the tenant thereafter made a good faith effort to cure such default. Appellant's Brief at 42, Long Island Gynecological Servs., 638 N.Y.S.2d 959 (No. 95-10358, 95-10986) [hereinafter Appellant's Brief] (citing to Para. 13 of Lease); *see also* Glicker v. Williams, 103 N.Y.S.2d 470, 471 (1st Dep't 1950) (holding tenants should be given reasonable time to cure default when tenant initiates appropriate steps to cure violation before summary proceedings are instituted); Humane Soc'y v. Joad Enter., Inc., 65 Misc. 2d 8, 10, 316 N.Y.S.2d 868, 870 (N.Y. Civ. Ct. N.Y. County 1970)

Yellowstone injunction effectively tolls the running of the commercial tenant's cure period so that in the event of an adverse determination on the merits, the tenant is given further opportunity to cure the defect and avoid forfeiture of a valuable commercial leasehold.[4] In the recent case of *Long Island Gynecological Services, P.C. v. 1103 Stewart Avenue Associates Limited Partnership,*[5] the New York State Supreme Court, Appellate Division, Second Department, held that a landlord could not unilaterally modify an abortion clinic tenant's lease so as to prohibit the performance of abortions in the building.[6] The court reasoned that the modification was not "reasonably prescribed" because abortion performance was a permissible activity under the original lease.[7] The promulgation of the new rule, therefore, unilaterally modified the original terms of the lease in violation of contract law.[8] Additionally, the court granted the tenant a *Yellowstone* injunction based upon the terms of the lease and the unique circumstances of the case even though the tenant filed for injunctive relief after the cure period had expired and the lease was terminated.[9]

In *Long Island Gynecological Services* (hereinafter "LIGS"), the Long Island Gynecological Services (hereinafter "the clinic"), a medical company which provides pregnancy terminations, obtained a commercial lease for space at 1103 Stewart Avenue, Garden City, New York.[10] The lease was for a period of eleven

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(recognizing that when tenant seeks to cure default landlord should cooperate to avoid forfeiture).

The tenant argued that a good faith effort was made to comply with both of the landlord's new rules by hiring a security guard, posting requisite signs, and installing security cameras. *See* Appellant's Brief at 43. The tenant also argued that the landlord frustrated its ability to cure by banning the clinic's security guard from patrolling the hallways and delaying installation of the tenant's security cameras. *Id.* (citing to Transcript of Plenary Hearing, dated May 17 and June 6-7, 1995, at 156-57) [hereinafter Hearing Tr.].

For a comprehensive overview of New York law on *Yellowstone* injunctions, see generally 2 RASCH, *supra* note 1, § 23:53, at 216-19.

[4] *See supra* note 3.

[5] 638 N.Y.S.2d 959 (2d Dep't 1996).

[6] *Id.* at 963.

[7] *Id.* at 962.

[8] *Id.* at 963; *see also supra* note 2 and accompanying text.

[9] *Long Island Gynecological Servs.*, 638 N.Y.S.2d at 963.

[10] Appellant's Brief at 4 (citing to Paras. 2 and 40 of Lease). The clinic initially entered into the lease with Sackson Development Corporation, a non-party to the present litigation. *Id.* (citing affidavit of Ronald J. Morey, sworn to on March 3, 1995) [hereinafter Mar. 3 Morey Aff.]. Approximately one year later, the current

years with an option to renew for two additional five-year terms.[11] The lease contained a "default provision" which explained the rights and responsibilities of both parties in the event of an alleged default by the tenant.[12] A "use" clause was also included in the lease which allowed the tenant to occupy the premises as medical offices.[13] At the commencement of the subject lease, the clinic expressly informed the original landlord, in writing, that the leased premises would be used to offer an "array of gynecological services" including pregnancy terminations.[14]

Tension between the clinic and the other tenants of the building began immediately. The other tenants regularly complained to the landlord that clients of the clinic were constantly loitering throughout the building,[15] invading their office space,[16]

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landlord, Ronald J. Morey [hereinafter the landlord], party to the present action, acquired the building subject to the tenant's lease and thereby accepted the rights and responsibilities of the lessor under the lease. *Id.* at 5. The landlord conceded that he had reviewed the tenant's lease and that he personally witnessed anti-abortion protests before final purchase of the building. *Id.* (citing to Hearing Tr. at 5-7).

[11] *Id.* at 4 (citing paras. 2 and 40 of Lease).

[12] Paragraph 13 of the lease provided that in the event of a default by the tenant, the landlord:

> [m]ay give [tenant] notice of such default, and if [tenant] does not cure any basic rent or additional rent default within fifteen (15) days or other default within thirty (30) days after giving of such notice (or if such other default is of such nature that it cannot be completely cured within thirty (30) days and thereafter proceeds with reasonable diligence and in good faith to cure such default), then [Landlord] may terminate this Lease on not less than ten (10) days' additional notice to [tenant], and on the date specified in said notice, [tenant's] right to possession of the Demised Premises shall cease, and [tenant] shall then quit and surrender the Premises to [Landlord].

Respondent's Brief at 25-26 (citing to para. 13 of Lease).

[13] The "use" clause in the lease reads as follows:

> USE AND OCCUPANCY. Lessee shall use and occupy the Premises as medical offices and for no other purpose. Lessor represents and warrants that the demised Premises can be lawfully occupied and used as an Article 28, Ambulatory, Surgical or diagnostic and treatment center.

Long Island Gynecological Servs., P.C. v. 1103 Stewart Avenue Assoc., Ltd. Partnership, No. 4890\95, 1995 WL 686571, at *1 (Sup. Ct. Nassau County Oct. 16, 1995), *rev'd*, 638 N.Y.S.2d 959 (2d Dep't 1996) (citing to para. 4 of Lease).

[14] Appellant's Brief at 4-5 (citing to Mar. 3 Morey Aff.).

[15] Respondent's Brief at 7 (citing to Hearing Tr. at 244).

[16] Respondent's Brief at 8 (citing to Hearing Tr. at 33, 80). On one occasion, a client of the clinic regurgitated in another tenant's office. *Id.* (citing to Hearing Tr. at 81). On yet another occasion, a client of the clinic changed her baby's diaper in a neighboring tenant's waiting room. *Id.* (citing to Hearing Tr. at 92, 250).

and interfering with the smooth operation of their businesses.[17] On June 28, 1994, in response to these numerous complaints, the landlord promulgated a new "waiting room rule" requiring all tenants to, among other things, "maintain a waiting room sufficient for visitors, guests and/or patients utilizing their space" and to post a sign advising patients to wait inside certain designated areas.[18] In response to the new rule, the clinic immediately posted the requisite sign and hired a security guard to help contain its patients.[19]

Tension among the tenants at 1103 Stewart Avenue intensified as violent anti-abortion protesters began to assemble in front of the building. Over a period of two years, the clinic and the other tenants were the victims of at least seventeen separate incidents of anti-abortion violence.[20] On January 12, 1995, in re-

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[17] Respondent's Brief at 8, 10. One tenant had to lock his office door during business hours to keep out the loiterers. *Id.* at 10 (citing to Hearing Tr. at 433).

[18] Long Island Gynecological Servs., P.C. v. 1103 Stewart Avenue Assoc., Ltd. Partnership, No. 4890\95, 1995 WL 68571, at *1. (Sup. Ct. Nassau County Oct. 16, 1995), *rev'd*, 638 N.Y.S.2d 959 (2d Dep't 1996).
The rule stated in its entirety:

> Please be advised that effective immediately, all tenants of 1103 Stewart Avenue will be required to maintain a waiting room sufficient for visitors, guests and/or patients utilizing their space. In addition, all visitors, guests and/or patients of tenants of 1103 Stewart Avenue will be required to wait either within the space being visited or outside the building. In order to effectuate the foregoing rule, each tenant will be required to post a sign in its waiting area containing the following statement 'ALL VISITORS, GUESTS AND/OR PATIENTS MUST WAIT EITHER IN THE WAITING AREA OR OUTSIDE THE BUILDING. PLEASE DO NOT WAIT IN THE COMMON AREAS OF THE BUILDING. THANK YOU.'
>
> This sign shall be prominently displaced [sic] in your waiting area. Failure to comply with this, or any other rules prescribed by 1103 Stewart Avenue Associates, L.P. shall constitute a default under each of their respective lease. Failure to cure such default after notice from 1103 Stewart Avenue Associates, L.P. shall constitute grounds for eviction from 1103 Stewart.

Id.

[19] Appellant's Brief at 7 (citing to Hearing Tr. at 63-65).

[20] The following seventeen incidents at 1103 Stewart Avenue were documented by the Nassau County Police Department:

Date	Charge
01/25/94	Assault/2nd degree-led to arrest.
01/25/94	Harassment/2nd degree—Landlords Greg Morey and John Caracciolo physically attacked.
03/15/94	Criminal Mischief/2nd degree—Shots fired at building window.

sponse to these incidents, the landlord promulgated a second new rule, the "safety rule," which prohibited any tenant of 1103 Stewart Avenue from engaging in any activity "which, in and of itself or through the related activities of others, (1) jeopardize[d] the safety or property of other tenants, their employees, and/or invitees or (2) interfere[d] with the comfort, quiet and convenience of all occupants of the Building."[21]

05/18/94	Criminal Mischief/3rd degree— Shots fired at building window.
07/10/94	Criminal Mischief/3rd degree—Lead sinker thrown at John Caracciolo and through Ron Morey's car window.
08/27/94	Criminal Mischief/2nd degree—Building directory stolen.
09/18/94	Criminal Mischief/2nd degree— Shots fired at building window.
10/10/94	Assault/3rd degree—Employee of 2nd floor tenant attacked. Victim exited elevator and was accosted from behind by two unknown subjects who dragged her down hall and slammed her into a wall several times and knocked her to the ground. Victim was dressed in a white nurse's uniform and was probably thought to be an abortion clinic worker, when in fact, she was not.
10/22/94	Criminal Mischief/2nd degree— Shots fired at building window.
11/27/94	Criminal Mischief/2nd degree—BB gun shots fired at station van window.
01/04/95	Aggravated Harassment/2nd degree—Bomb scare/false report .
01/07/95	Aggravated Harassment/2nd degree—Threatening notes. posted on building stating "Danger. This is a war zone. People are being killed here—like Boston. You risk injury or death if you are caught near these premises."
01/11/95	Bomb Scare/false report
01/12/95	Criminal Mischief/3rd degree—Tenant's office door glued shut.
01/31/95	Harassment/2nd degree—Chicken livers found on 2nd floor.
02/15/95	Trespassing—Led to arrest.
02/15/95	Trespassing—Led to arrest.

Long Island Gynecological Servs., No. 4890\95, 1995 WL 686571, at *2.

[21] The "safety rule" stated in its entirety that:

> [n]o tenant of 1103 Stewart Avenue shall engage in any activity (or allow any activity to be conducted on or in the leased premises) which, in and of itself or through the related activities of others, (1) jeopardizes the safety or property of other tenants, their employees, and/or invitees or (2) interferes with the comfort, quiet and convenience of all occupants of the Building.
>
> It should be emphasized that the foregoing rule is an emergency measure which requires immediate compliance. Any tenant's failure to comply with the foregoing rule can (after expiration of appropriate cure periods) constitute a default under the tenant's lease and be grounds for eviction.

On the same date that the "safety rule" was issued, the clinic was served with notice that they were in default of both the "waiting room rule" and the "safety rule" and was given Yellowstone days to cure the default or risk eviction.[22] Thirty-one days later, the cure period expired and the clinic was served with a Notice of Termination and given ten days to vacate the premises.[23] Nine days later, the clinic filed for *Yellowstone* injunctive relief.[24]

The New York State Supreme Court denied the clinic's motion for a *Yellowstone* injunction after a plenary hearing found that both the "waiting room rule" and the "safety rule" were reasonably prescribed.[25] The New York State Supreme Court, Ap-

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Id. at *1 - *2.

It is important to note that the January 12th "safety rule" retracted a rule delivered by the landlord the previous day which stated, in part, that "effective immediately, no tenant of 1103 Stewart Avenue shall perform any abortions or other medical services in any way related to pregnancy terminations...." Appellant's Brief at 10. Although this rule was meant to apply to all tenants, the clinic was the only abortion provider in the building. *Id.* (citing to Hearing Tr. at 24). The landlord had conceded during judicial proceedings that the January 12th rule was promulgated to "adjust the language" of the January 11th rule while still accomplishing the same results of prohibiting abortions. *Id.* at 11-12 (citing to Hearing Tr. at 121-22). The landlord's own expert witness on commercial leasing and management, testified that if the purposes of the January 12th rule was the same as the January 11th rule, prevention of abortions, a permissible activity under the lease, then it was unreasonable. *Id.* at 12 n.4 (citing to Hearing Tr. at 423-24). In essence, according to the "safety rule", the tenant was in default of the lease if, in response to the abortion procedures performed by the clinic, anti-abortion protesters victimized or harassed the other tenants of the building. *See supra* note 20.

[22] *Long Island Gynecological Servs.*, No. 4890\95, 1995 WL 686571, at *2. At the hearing, the landlord's expert testified that it was unusual to simultaneously issue a new building rule and a default notice of the same rule. Appellant's Brief at 12 (citing to Hearing Tr. at 513).

[23] The Notice of Termination stated that "by the continued performance of abortion procedures, you have continued to place in jeopardy the safety and property of other tenants ... and caused their comfort, quiet and convenience to be interfered with." Respondent's Brief at 17. The landlord conceded that LIGS' only violation of the "safety rule" was the continued performance of abortion procedures. Appellant's Brief at 16 (citing to Hearing Tr. at 123).

[24] Long Island Gynecological Servs., P.C. v. 1103 Stewart Ave. Assocs. Ltd. Partnership, 638 N.Y.S.2d 959, 961 (2d Dep't 1996).

[25] *Long Island Gynecological Servs.*, No. 4890\95, 1995 WL 68571, at *3. A temporary restraining order was granted to the tenant. *Id.* The New York Supreme Court then ordered a plenary hearing to determine the reasonableness of the rules prescribed by landlord. Appellant's Brief at 17. The court found the rules to be reasonably prescribed to prevent physical harm from being inflicted on other tenants and made no determination on the issue of the *Yellowstone* injunction. *Long Island Gynecological Servs.*, No. 4890\95, 1995 WL 686571, at *3. This ruling allowed the landlord to commence eviction proceedings and rendered the tenant without remedy

pellate Division, Second Department, in an opinion by Judge Mangano, reversed the Supreme Court's finding and held that the clinic was entitled to a *Yellowstone* injunction and that the "safety rule" was not reasonably prescribed.[26] The court began its opinion by noting that an application for a *Yellowstone* injunction must be sought before the tenant's cure period expires and before the landlord terminates the lease or the application is considered untimely and the "court [is divested] of its power to grant a *Yellowstone* injunction ...."[27] The court observed, however, that the lease itself provided for an extended cure period if the default could not "be completely cured within thirty (30) days and [the tenant] thereafter proceed[ed] with reasonable diligence and in good faith to cure such default."[28] The court reasoned that though the thirty-day cure period had expired, the *Yellowstone* injunction should have been granted because the clinic "successfully demonstrated that it could not completely cure its alleged defaults within the thirty-day cure period ... [and] was therefore entitled to more [time]."[29]

The court also found that the "safety rule" inherently prevented abortion procedures, thereby unilaterally modifying and altering the lease in violation of contract law.[30] The "safety rule," therefore, could not "be used as a predicate for holding the tenant in default."[31] The legitimacy of the "waiting room" rule was not at issue in this appeal.

It is submitted that the Appellate Division ruled incorrectly

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to prevent forfeiture of the leasehold. *Id.*; *see also* Mann Theatres Corp. of Cal. v. Mid-Island Shopping Plaza Co., 94 A.D.2d 466, 475-76, 464 N.Y.S.2d 793, 800-01 (2d Dep't 1983), *aff'd*, 62 N.Y.2d 930, 468 N.E.2d 51, 479 N.Y.S.2d 213 (1984) (noting that without *Yellowstone* injunction tenant's lease could automatically be forfeited without further opportunity to cure).

[26] *Long Island Gynecological Servs.*, 638 N.Y.S.2d at 962. The "reasonableness" of the "waiting room rule" was not contested by the tenant upon appeal. *Id.*

[27] *Id.* (citations omitted).

[28] *Id.*; *see also supra* note 12 which sets out the default provision in full.

[29] *Long Island Gynecological Servs.*, 638 N.Y.S.2d at 962.

[30] *Id.* at 962-63; *see also* Lundberg v. Board of Educ. of Gloversville Enlarged Sch. Dist., 127 Misc. 2d 804, 806, 487 N.Y.S.2d 306, 309 (N.Y. Sup. Ct. Fulton County 1985) (noting that unilateral alterations of contracts are not binding on other party); Shore Terrace Realty Assocs. v. Smosna, 115 Misc. 2d 581, 585, 454 N.Y.S.2d 507, 509 (N.Y. Civ. Ct. Queens County 1982) (noting landlord may not unilaterally alter written lease unless lease expressly provided for such contingency); 1020 Park Ave., Inc. v. Raynor, 97 Misc. 2d 288, 289, 411 N.Y.S.2d 172, 173 (N.Y. Civ. Ct. N.Y. County 1978) (holding that lease options "cannot be unilaterally altered or revoked").

[31] *Long Island Gynecological Servs.*, 638 N.Y.S.2d at 963.

in granting the *Yellowstone* injunction to the clinic because the clinic did not meet the requisite requirement of timeliness.[32] The court interpreted the default clause in the lease as granting an extension of the time period during which the clinic was required to seek an injunction.[33] It is submitted that this default was curable within thirty days and as such, the tenant was required to seek injunctive relief before the end of the cure period.[34] Further, even if the clinic had believed that the default could not be cured within thirty days and that the landlord was frustrating their efforts to cure, the ambiguous language of the terms of the lease did not excuse the clinic from taking affirmative, timely steps to protect the leasehold within the thirty day time period prescribed by the Default Notice itself.[35] By allowing the clinic to receive injunctive relief beyond the traditional time limitations, the court is revising the threshold requirements of the *Yellowstone* injunction which are embedded in precedent.[36] It is submitted that the need for judicial stability and clarity in the law is

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[32] *See supra* note 3 and accompanying text.

[33] *See Long Island Gynecological Servs.*, 638 N.Y.S.2d at 962; *see also supra* note 12 (setting forth default clause in its entirety). The court reasoned that because the landlord frustrated the tenant's efforts to expeditiously cure the default, the tenant was entitled to an extended cure period. *Long Island Gynecological Servs.*, 638 N.Y.S.2d at 962.

[34] *See* Respondent's Brief at 32, 33 (noting that tenant could have reduced its business volume or rescheduled appointments to avoid overcrowding). The tenant's attorney argued that tenant was in full compliance with both the Waiting Room Rule and the Safety Rule. *See id.* Notably, however, it was suggested that installation of video surveillance cameras would not have ultimately solved the problem of inadequate waiting room space and overbooking by the clinic. Nevertheless, no suggestion was made that the rules could not be complied with within the prescribed 30 day cure period and consequently no extension of the cure period was ever requested from the landlord. *Id.* at 33 (citing Affidavit of clinic manager Gail Fink, sworn to on Feb. 21, 1995); *cf.* David Frey, *The Yellowstone Injunction, or "How to Vex Your Landlord Without Really Trying"*, 58 BROOK. L. REV. 155, 173 (1992) (stating that many *Yellowstone* tenants could have cured violations at little cost within prescribed cure period).

[35] *See* Respondent's Brief at 17 (citing to Notice of Default which gave tenant 30 days to cure); *see also id.* at 34 (noting tenant consistently maintained it was not in violation of new rules and therefore would not have needed extended time period to cure); S.E. Nichols, Inc. v. American Shopping Ctrs., 115 A.D.2d 856, 858, 495 N.Y.S.2d 810, 812 (3d Dep't 1985) (explaining that "there is no basis for preliminary injunctive relief where the injunction is not sought until after expiration of the cure period and after a termination notice has been served"); Health 'N Sports, Inc. v. Providence Capitol Realty Group, Inc., 75 A.D.2d 884, 885, 428 N.Y.S.2d 288, 289 (2d Dep't 1980) (noting tenants failure to seek *Yellowstone* injunction within cure period divested court of power to grant stay).

[36] *See supra* note 3 and accompanying text.

more compelling than extending the cure period for a controversial tenant in a well-publicized case based upon nothing more than the ambiguous boiler plate language of the lease and judicial sympathy.[37] The court's interpretation of the ambiguous language of the default clause and its subsequent ruling leads to instability and uncertainty in the context of landlord/tenant law.

It is further submitted that the court reached the correct conclusion in ruling that the "safety rule" was not reasonably prescribed because it unilaterally modified the lease by prohibiting abortions.[38] The court did not, however, sufficiently expand on its definition of "reasonableness."[39] If, for example, the "safety rule" did not blatantly restrict abortions, would the rule have been held "reasonable" even though it made the tenant responsible for the criminal actions of third parties?[40] New York courts

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[37] *See* Holy Properties Ltd., L.P. v. Kenneth Cole Prod., Inc., 87 N.Y.2d 130, 134, 661 N.E.2d 694, 696, 637 N.Y.S.2d 964, 966 (1995) (noting that in area of real property law, certainty of established rules is premier and not to be lightly cast aside); First Nat'l Stores, Inc. v. Yellowstone Shopping Ctr., Inc., 21 N.Y.2d 630, 638, 237 N.E.2d 868, 871, 290 N.Y.S.2d 721, 725 (1968) (noting judicial sympathy must not undermine stability in the law).

[38] Long Island Gynecological Servs., P.C. v. 1103 Stewart Ave. Assocs. Ltd. Partnership, 638 N.Y.S.2d 959, 963 (2d Dep't 1996).

[39] The court only held that the "safety rule" was not reasonably prescribed because it unilaterally modified the lease in violation of contract law. *Id.*

[40] To hold a tenant liable for the criminal acts of third parties would have ramifications much more far-reaching than abortion providers—all tenants who are the targets of illegal actions would be affected. *See* Appellant's Brief at 33 (noting that fur coat retailer could be evicted due to violent animal rights protesters and battered women could be evicted because of violent mate); *amicus curiae* brief of New York Clinic Defense Task Force at 18 (No. 95-10358, 95-10986) (suggesting that landlord could evict government agency because of threat of violence from anti-government militants); *see also Protests Aren't Cause for Eviction*, NEWSDAY, Feb. 23, 1996, at A46 (suggesting every tenant would be vulnerable to eviction because of "anyone with a gripe or a grudge"); Priscilla J. Smith, *Clinic Ruling Plays Into Terrorism*, NEWSDAY, Nov. 8, 1995, at A37 (noting judiciary must send message that society will punish the aggressor and not the victim); Warren Strugatch, *Judge's Ruling In Eviction Sparks Debate*, NEWSDAY, Nov. 10, 1995, at D01 (noting LIGS Supreme Court decision may be used as excuse to terminate leases of tenants associated with feminism or gay rights causes). *But see* John T. McQuiston, *NY Judge Allows Landlord's Eviction of Abortion Clinic*, DALLAS MORNING NEWS, Nov. 12, 1995, at 41A (quoting anti-abortion right activist as saying she hoped same rationale behind Supreme Court decision in LIGS could be used to close down other abortion providers); Smith, *supra*, at A37 (noting logic of anti-abortion violence is to intimidate until ultimately there will be no one willing to conduct abortions).

The ramifications of the LIGS decision on both abortion providers and their patients have been discussed in several recent articles. *See* Ruth Ann Leach, *Show O.J. A Few Photos Of His Battered Ex-wife*, NASHVILLE BANNER, Nov. 2, 1995, at A15 (stating that Supreme Court's decision signifies that "anti-abortion forces can

have consistently held that the criminal acts of third parties cannot be the basis for terminating a tenant's lease.[41] The LIGS court, however, never mentioned this as a factor in their analysis of "reasonableness." The case at bar provided ample opportunity for the court to take a strong public policy stance and fashion a clear cut standard against tenant liability for criminal actions of third parties.[42] It is submitted that the court should have expanded its analysis of "reasonableness" and unequivocally held that any rule holding a tenant liable for the criminal actions of a third party is inherently "unreasonable" and void as against public policy.[43]

Violent anti-abortion protests have increased over the past decade causing turmoil in many landlord/tenant relationships.[44]

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get what they want if they[] use criminal tactics to frighten tenants and landlords"); *Protests Aren't Cause for Eviction*, *supra*, at A46 (stating that effect of appellate decision in LIGS will be to prevent landlords from voiding valid leases due to threats from abortion opponents); Smith, *supra* at A37 (arguing that ruling in favor of landlord will hand extremist anti-abortion protesters a victory in "their war of attrition"); Strugatch, *supra*, at D01 (addressing fact that if Supreme Court decision in LIGS was upheld all tenants could be at risk of their premises because of action of outsiders).

[41] *See* Kings County Dist. Attorney's Office v. Freshley, 160 Misc.2d 302, 309, 608 N.Y.S.2d 788, 792-93 (N.Y. Civ. Ct. Kings County 1993) (holding that illegal activity within tenant's premises did not warrant eviction); Mobil Oil Corp. v. Burdo, 69 Misc. 2d 153, 158-59, 329 N.Y.S.2d 742, 749 (Dist. Ct. Suffolk County 1972) (stating "where it can be shown that tenant was not involved with the criminal activities nor acquiesced to their continuance, eviction is not justified"); Humane Soc'y v. Joad Enter., Inc., 65 Misc. 2d 8, 9, 316 N.Y.S.2d 868, 869 (N.Y. Civ. Ct. New York County 1970) (holding that "[t]he fact that several people were arrested on the respondent's premises for criminal acts committed without the respondent's knowledge or acquiescence will not justify a forfeiture of the lease").

Further, in *Giuffre v. Wisconsin Women's Health Care Ctr., S.C.*, a landlord moved for summary eviction proceedings against an abortion clinic tenant because of disturbances created by anti-abortion protesters. 180 Wisc. 2d 471, 514 N.W.2d 55 (1993). The court refused to grant the landlord the eviction, noting that abortions are a legal activity and were permitted under the lease and that the tenant "cannot be held responsible for the behavior of third parties who are neither their guests nor by any stretch of the imagination invitees." *Id.*

[42] The court was being watched closely by both fronts of the abortion debate to see if violent, terrorist-like tactics really could serve as a basis to have a tenant evicted. *See supra* note 40.

[43] *See supra* note 40.

[44] *See* United States v. Cooley, 787 F. Supp. 977, 989 (D. Kan. 1992) (noting anti-abortion protesters threatened escorts and guards with physical harm "while other persons in the crowd climbed the clinic's fences and charged the gate"); Fargo Women's Health Org., Inc. v. Lambs of Christ, 488 N.W.2d 401, 405 (N.D. 1992) (noting anti-abortion protesters scaled walls and fences surrounding parking lot and simultaneously charged police guarding gate to abortion clinic); Roni Rabin, *Study: Clinics Under Fire Bill Seeks To Halt Attacks on Abortion Centers*, NEWSDAY, Nov.

Both landlords and tenants should be accorded the right to rely upon established precedent and succinct opinions in order to clearly understand their rights and responsibilities under the law.[45] The LIGS court failed to provide stable guidance to meet this end. Perhaps future litigation will result in the promulgation of a clear cut standard needed to reaffirm stability in landlord/tenant jurisprudence.

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5, 1993, at 17 (stating half of abortion clinics responding to national survey were victims of death threats, bomb threats, chemical attacks, arson and blockades in 1993); Smith, *supra* note 40, at A37 (noting four abortion clinic workers were killed and seven were seriously injured in 1994); *see also* S. REP. NO. 103-117, at 8 (1993) (noting that in Michigan, fourteen clinics were attacked with butyric acid within two week period and, in San Diego, five clinics "were sprayed with butyric acid, causing four people to be taken to hospitals").

[45] *See supra* note 37 and accompanying text.